

THOMAS CHAPMAN
Claimant

GOODYEAR TIRE & RUBBER COMPANY
Respondent

TRAVELERS INSURANCE COMPANY
Insurance Carrier

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Is claimant entitled to future and unauthorized medical?
- (3) Is claimant entitled to temporary partial disability for the periods from April 26, 1996 to June 30, 1996, and from July 16, 1996 to August 29,

1996? (It is noted at page 4 of the preliminary hearing transcript the parties stipulated if claimant is entitled to temporary partial disability compensation, the appropriate rate would be \$201.01 per week.)

DOCKET No. 231,187

- (1) Did claimant suffer personal injury by accident on the date or dates alleged?
- (2) Did claimant's alleged accidental injuries arise out of and in the course of his employment?
- (3) What is the nature and extent of claimant's injury and/or disability?
- (4) Is claimant entitled to future and unauthorized medical expense?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Claimant, a 32-year employee with respondent, was injured on April 26, 1996, when a hook he was using to pull rubber was caught in a machine. Claimant was yanked and thrown, suffering injury to his right upper extremity including his shoulder. Claimant also had symptoms in his chest, neck and upper back.

Claimant was treated at the plant dispensary and placed on light duty, where he stayed almost continuously until his last day worked with respondent on April 4, 1997, at which time he took a medical retirement. Claimant did return to regular work for approximately two months in 1997, during which time his symptoms worsened. Claimant was referred to Deborah T. Mowery, M.D., who placed him on light duty with specific restrictions. During the time claimant was on light duty, he testified he was not supposed to work overtime, thus reducing his weekly income. This is the basis for claimant's allegations of entitlement to temporary partial disability compensation.

Claimant underwent conservative treatment for the shoulder, but ultimately underwent surgery in October 1996 with Peter S. Lapse, M.D. The surgery performed was a subacromial decompression, intending to reduce the pressure on the rotator cuff and eliminate rubbing. Claimant's primary problems were in his right shoulder, with pain in his sternum and his neck. Later, pain developed in his left shoulder as well.

When claimant was returned to work by Dr. Mowery, his restrictions included no lifting above the chest area with no pushing or pulling. The representative from respondent indicated those restrictions were too severe. Claimant was then asked to attend an ADA meeting in order to ascertain whether he could continue working at Goodyear. By April 1997, it was determined that claimant could not hold a full-time position with respondent, and claimant took medical retirement from Goodyear as of April 4, 1997. Claimant receives medical retirement benefits in the amount of \$1,300 per month, which claimant testified he would lose if he were to accept any type of employment. He testified he would only return to work if there was a job where he could earn at least \$1,300 per month.

Claimant was referred to numerous health care providers for evaluation and treatment. Four of those health care providers testified in this matter. Phillip L. Baker, M.D., a board certified orthopedic surgeon, first saw claimant on May 14, 1996, and again on July 23, 1996, for the purpose of assisting in his treatment. Claimant had suffered injury to his right shoulder, with pain complaints into the sternoclavicular joint. Dr. Baker assessed claimant a 20 percent impairment to the right upper extremity, with 10 percent of that 20 percent being related to the sternoclavicular joint and the remainder being related to the shoulder. In Dr. Baker's opinion, involvement of the sternoclavicular joint would be a disability to the shoulder. However, he acknowledged an injury to the sternum would be considered a body as a whole injury.

Dr. Baker restricted claimant from lifting 30 pounds or more on a frequent basis and limited claimant's lifting on the right side from the shoulder height down.

Dr. Baker testified that, in his opinion, the sternoclavicular joint was a portion of the shoulder and the supporting structure of the shoulder. That was the reason why his rating was limited to the shoulder and did not involve a body as a whole rating. He acknowledged there had been a reduction in the stability of claimant's sternoclavicular joint due to the injury, but again limited his impairment to the right upper extremity at the shoulder only. He testified that there was no discussion in the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, concerning the sternoclavicular joint.

Claimant was referred to Edward J. Prostic, M.D., a board certified orthopedic surgeon, by his attorney. Dr. Prostic examined claimant on September 17, 1999. Dr. Prostic also diagnosed injuries to claimant's right shoulder and sternoclavicular joint. He testified that the sternum is considered to be a portion of the body as a whole. He went on to state that there was damage to the joint between the meniscus and clavicle and between the meniscus and the sternum. He also acknowledged that the sternum is considered to be a portion of the body as a whole under the AMA Guides, but did not recall whether the AMA Guides gave a specific rating for the sternum.

During his examination of claimant, Dr. Prostic diagnosed clicking and popping in both shoulders as well as in the sternoclavicular joint. He found these findings to be objective findings of injury. He assessed claimant a 10 percent impairment to the left

upper extremity and a 20 percent impairment to the right upper extremity, which combines for a 17 percent whole person impairment. He also testified that there was mild to moderate crepitus in the left shoulder during active range of motion, which he considered an objective finding.

In discussing the task list created by Bud Langston, Dr. Prostin found claimant incapable of performing seven of the thirteen prior tasks, for a 54 percent loss of task performing abilities. He had no information in his medical records to show that claimant had pain complaints in his neck.

Claimant was referred by his attorney to P. Brent Koprivica, M.D., board certified in occupational medicine and emergency medicine, for an examination. Dr. Koprivica diagnosed chronic impingement syndrome of the right shoulder for which claimant underwent a subacromial decompression. He also diagnosed pain symptoms in claimant's left upper extremity, which he described as being typical. Additionally, claimant had symptoms in the neck, which Dr. Koprivica testified generally led to symptoms in the opposite shoulder. Dr. Koprivica stated that this symptom progression was typical, which means it occurs in more than 50 percent of the cases. He stated claimant had degenerative problems in his left shoulder stemming from the injury to his right upper extremity and neck. In his opinion, claimant's left shoulder problems were the result of overuse. He assessed claimant a 17 percent whole person impairment involving both the right and left shoulders and the neck. In reviewing the task list of Bud Langston, he opined claimant could not perform five of the thirteen tasks, which results in a loss of task performing ability of 38 percent.

Claimant was referred to Vito J. Carabetta, M.D., board certified in physical medicine and rehabilitation, by the Administrative Law Judge for an independent medical examination on February 1, 1999.

Dr. Carabetta found claimant had a right shoulder injury with the primary area of discomfort being in the sternoclavicular joint. He also testified the sternoclavicular joint is a part of the shoulder complex and assessed claimant a 17 percent impairment to the right upper extremity at the shoulder. He described the sternoclavicular joint as being an anchor point for the clavicle which is all part of the shoulder complex. He examined claimant's neck and left shoulder, but was unable to find any ratable disability in either area. He also acknowledged if there was a fracture to the sternum or injury to the sternum, that would be rated as a whole body rating, rather than a portion of the shoulder. He went on to state, however, that fractures to the sternum generally heal without impairment. He also acknowledged that the sternoclavicular joint is not listed as part of the shoulder in either the AMA Guides, Third Edition (Revised), or AMA Guides, Fourth Edition.

When asked about the pain claimant felt in his sternum, Dr. Carabetta testified that the sharp pain was actually in the sternoclavicular joint itself and that there was structurally nothing wrong with the sternum.

In performing measurements on claimant's upper extremities, Dr. Carabetta found the left forearm to be larger than the right, which indicated claimant was using his left side more often.

In reviewing claimant's task list, Dr. Carabetta found claimant incapable of performing seven of thirteen tasks, for a loss of 54 percent.

As was stated above, claimant took medical retirement from respondent effective April 4, 1997. Claimant receives \$1,300 a month in medical retirement disability benefits. Since leaving respondent's employment, claimant has sought no additional employment. He testified that he would only seek additional employment if a job were provided which would pay him in excess of the \$1,300 monthly benefit. Accepting any job would cost him those benefits, and he was not willing to trade a lesser paying job for the benefit of the medical retirement.

CONCLUSIONS OF LAW

In workers' compensation litigation, the burden of proof is on claimant to establish his right to an award of compensation by proving all the various conditions upon which that right depends by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g); see also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant suffered injury to his right upper extremity on April 26, 1996. The injury was of a traumatic nature, causing claimant to experience pain in his right shoulder, chest and the top part of his back, including his neck. Claimant acknowledged his primary problem was his right shoulder and his sternum, but later developed problems in his left shoulder as a result of overcompensation.

When a primary injury under the Workmen's Compensation Act arises out of and in the course of employment, every natural consequence that flows from the injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 372, 564 P.2d 548 (1977).

The Board finds claimant has proven that his injuries extend beyond the impairment to the right upper extremity. The medical evidence is uncontradicted that an injury to the

sternum would be considered a body as a whole injury. One dispute here is whether claimant's injury is in the sternum or limited to the sternoclavicular joint. The Board finds the medical evidence sufficient to indicate that claimant's injury goes outside the shoulder girdle into the sternum and, therefore, claimant should be compensated for a body as a whole injury. Additionally, claimant's left shoulder problems, which developed as a result of overcompensation, are a direct and natural consequence of claimant's April 26, 1996 accident. Therefore, for the above reasons, the Board finds claimant is entitled to at least functional disability based upon a whole body impairment, rather than being limited to a scheduled injury to the right shoulder.

In reviewing the testimony of Dr. Prostic and Dr. Koprivica, who rated claimant to the body as a whole, the Board finds claimant has a 17 percent whole body functional impairment as a result of the injuries suffered on April 26, 1996. As claimant continued working at his regular occupation, although at times on light duty, through April 4, 1997, claimant is entitled to his functional impairment through that date.

After April 4, 1997, claimant was unable to continue performing his duties and was forced to take medical retirement.

The evidence in the record indicates that claimant retained the ability to perform work, although not work with this particular respondent. Claimant is, therefore, entitled to a work disability under K.S.A. 1996 Supp. 44-510e which states, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

Both Dr. Prostic and Dr. Carabetta, in reviewing the task list of Bud Langston, opined claimant was incapable of performing seven of the thirteen tasks, for a 54 percent task loss. Dr. Koprivica found claimant incapable of performing five of the thirteen tasks, for a 38 percent task loss. Dr. Baker testified that claimant was not limited in his ability to perform any of the thirteen tasks, even though he placed a 30-pound restriction on claimant for any work over claimant's shoulder performed on a frequent basis. The Board does not find the opinion of Dr. Baker persuasive. In considering the task loss opinions, the Board finds claimant has suffered a 46 percent loss of task performing abilities.

K.S.A. 1996 Supp. 44-510e requires that the task loss be averaged with any wage loss the worker has suffered. In considering claimant's entitlement to a work disability

based upon a wage loss, the Board must first consider whether claimant has violated the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proffered job the worker has the ability to perform. In this instance, claimant returned to work with respondent at a less than comparable wage, performing limited duties and was paid temporary partial disability. When returned to regular work, claimant was unable to perform the duties and was, thus, forced to take the medical leave. The Board does not find claimant in violation of the policies set forth in Foulk.

The Board, however, must also consider whether claimant violated the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals held that if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. In this instance, once claimant accepted the medical retirement, he ceased looking for any type of job. Claimant testified at regular hearing that he was being paid \$1,300 per month through his medical retirement. If he accepted a job, he would lose the \$1,300 a month. Claimant stated that he would accept a job only if it paid above \$1,300 a month.

The Board finds claimant did not put forth a good faith effort, post injury, to obtain employment. The Board must, therefore, impute a wage based upon the evidence in the record. In considering the record, the Board finds little indication of claimant's ability to earn wages. The Board will, therefore, impute to claimant the minimum wage of \$5.15 per hour. As claimant is not limited to part-time employment, the Board will also compute claimant's wage based upon a 40-hour week. This computes to \$206 per week which, when compared to claimant's pre-injury wage of \$489 per week, equals a 58 percent wage loss. When a worker establishes an inability to work at the pre-disability job, the burden is on the employer to prove other work is available to the worker and the average weekly wage the worker is capable of earning at that employment. Slack v. Theis Development Corp., 11 Kan. App. 2d 204, 718 P.2d 310 (1986).

As K.S.A. 1996 Supp. 44-510e obligates an average between the task and wage losses, the Board finds claimant has suffered a 52 percent permanent partial general body disability as a result of the injuries suffered on April 26, 1996.

As the Board has found claimant entitled to a general body disability, the Administrative Law Judge's denial of temporary partial disability compensation is reversed. The parties have stipulated claimant's entitlement to temporary partial would be based upon a \$201.01 per week rate. The Board finds claimant entitled to temporary partial disability compensation at that rate for the weeks April 26, 1996 to June 30, 1996, and July 16, 1996 to August 29, 1996.

The Board further finds claimant entitled to future medical upon application to and approval by the Director.

Claimant is additionally entitled to unauthorized medical up to the statutory limit for the injuries suffered on April 26, 1996.

With regard to Docket No. 231,187, the Board affirms the Administrative Law Judge's finding that claimant did not suffer a separate and distinct personal injury by accident in that docketed claim.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated September 27, 2000, should be, and is hereby, modified, and claimant is granted an award for a 17 percent whole body functional impairment through April 4, 1997, followed thereafter by a 52 percent permanent partial general body disability, for the injuries suffered on April 26, 1996.

Claimant is entitled to temporary partial disability compensation at the rate of \$201.01 per week for the weeks April 26, 1996 to June 30, 1996, and July 16, 1996 to August 29, 1996 totaling \$3,188.02. Claimant is also entitled to 24.43 weeks of temporary total disability compensation at the rate of \$326 per week totaling \$7,964.18, followed thereafter by 14.79 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$4,821.54 for a 17 percent permanent partial general body disability on a functional basis, followed thereafter by 191.02 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$62,272.52 for a 52 percent permanent partial general body disability, for a total award of \$78,246.26.

As of the date of this Award, the entire amount is due and owing in one lump sum, minus any amounts previously paid.

Claimant is further awarded future medical upon proper application to and approval by the Director.

Claimant is additionally awarded unauthorized medical for the accident of April 26, 1996, up to the statutory maximum upon presentation of an itemized statement verifying same.

Claimant's contract of employment with his attorney is affirmed insofar as it does not contradict the provisions of K.S.A. 44-536 (Furse 1993).

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier as follows:

Gene Dolginoff Associates, Ltd.	
Deposition of Edward J. Prostic, M.D.	\$442.80
Deposition of P. Brent Koprivica, M.D.	\$513.35
Christian Reporting Service	
Deposition of Bud Langston	Unknown
Curtis, Schloetzer, Hedberg, Foster & Associates	
Deposition of Phillip L. Baker, M.D.	\$529.40
Deposition of Vito J. Carabetta, M.D.	\$279.50
Preliminary Hearing	\$175.90
Appino & Biggs	
Regular Hearing	\$558.50

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the majority's opinion in the above matter. The undersigned acknowledges that claimant is entitled to a whole body impairment based upon the evidence in this record. However, with regard to the wage loss provisions of K.S.A. 1996 Supp. 44-510e, the undersigned would impute to claimant the \$1,300 per month claimant was earning through his medical retirement. Claimant testified at the regular hearing that he was not looking for a job, which, under Copeland, would

indeed be bad faith. However, in considering what, if any, wage claimant should be imputed, the Board failed to take into consideration the fact that claimant testified that he would refuse any job paying less than \$1,300 per month. This computes to \$300 per week. In computing the work disability, the undersigned would impute to claimant the ability to earn \$300 per week, which would result in a wage loss of 39 percent, rather than the 58 percent used by the majority. This would entitle claimant to a 42.5 percent permanent partial general body work disability, rather than the 52 percent work disability awarded by the majority. See Parsons v. Seaboard Farms, Inc., WCAB Docket No. 227,035 (Aug. 1999), affirmed at 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John A. Bausch, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director